IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 110

TAK SHAN FONG,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER, TAK SHAN FONG

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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CITATIONS.

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Opinion Below

The opinion of the United States Court of Appeals, Second Circuit, is officially reported in 254 F. 2d 4.

Jurisdiction

The judgment of the Court of Appeals was entered March 20, 1958 (R. 15). The petition was filed June 16, 1958 and was granted October 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

May an alien who had been lawfully admitted to the United States and subsequently departed, and who there-

after entered unlawfully, be naturalized under 8 U. S. C. 1440a(2) provided he complied with all the additional requirements of such statutory provision?

Must the single period of physical presence, required by the statute, commence immediately after lawful entry?

Statute Involved

"§ 1440a. Naturalization through active service in the armed forces after June 29, 1950; requirements and exceptions; proof of service

Notwithstanding the provisions of sections 1421 (d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter, except that—* * *." 8 U. S. C., p. 266.

Statement

Petitioner, a native and citizen of China, was lawfully admitted to Honolulu, T. H., as a seaman, on August 24, 1951[1]. He remained there for 29 days and departed. On January 27, 1952 he entered the United States at Newport News, Virginia. He was detained on board as a person inadmissible as a bona fide seaman. Official records show he deserted the vessel and escaped (R. 7, 11).

[1] This information is contained in Department of Justice file.

On June 8, 1952 he was apprehended and was accorded a hearing in deportation proceedings. He testified that he did not see any immigration officers aboard the vessel, and left such vessel two days after arrival, without permission. He also testified that after securing permission to leave the ship from an officer, he departed for New York; that when he returned four days later the vessel upon which he arrived had departed (R. 8). On January 15, 1954 he was ordered deported but the delivery bond was cancelled by the Immigration Service upon learning that petitioner had been inducted into the United States Army on May 4, 1953 (R. 8). Petitioner served in the United States Army until May 3, 1955 when he was honorably discharged. All his service was within the United States (R. 8).

A petition for naturalization, pursuant to 8 U. S. C. 1440a, was filed by Tak Shan Fong in the United States District Court for the Southern District of New York on December 22, 1955, wherein it was stated that he was lawfully admitted to the United States in 1952 (R. 2). At the hearing before the Court, the Naturalization Examiner, in his Findings of Fact, stated that petitioner did serve on an active duty status in the Armed Forces of the United States and was honorably released (R. 9). He recommended denial of the petition on the ground that the petitioner had failed to establish lawful admission to the United States (R. 10).

United States District Judge Murphy disapproved the recommendation of the Naturalization Examiner and made new findings of fact and conclusions of law, among which it was stated that "petitioner had been lawfully admitted to the United States, to wit, at the Port of Honolulu, T. H.,

on August 24, 1951." The petition for naturalization was granted (R. 4, 5).

The Court of Appeals reversed *per curiam*. The reversal was based on the Court's previous decision in *United States v. Boubaris*, 244 F. 2d 98 (2 Cir., May 8, 1957). Therein, by a divided Court, it was held that 8 U. S. C. 1440a "required that the 'single period of at least one year' be immediately consecutive to the lawful admission required by that section. This continuity is concededly lacking in both of present cases" (R. 14).[2]

Summary of Argument

The section, namely 1440a of the United States Code, was enacted for the sole purpose of rewarding certain aliens who rendered honorable service to our country during the Korean conflict. Congress did not provide that lawful admission and physical presence sequence must be immediately consecutive. The majority of the Court of Appeals erred in the judicial interpretation it placed upon such statute.

The ambiguity of the statute, coupled with the conduct of the Selective Service and the Immigration and Naturalization Service, requires a construction in favor of petitioner.

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[2] An *en banc* hearing was denied; Judge Frank agreed with dissent in *U. S. v. Boubaris*. Petitioner's appeal was heard with another appeal by one Chan Chick Shick.

ARGUMENT

I

The statute, 8 U. S. C. 1440a, was designed to reward aliens who had honorably served in the armed forces of the United States during the Korean conflict. Such statute did not provide that lawful admission and physical presence sequence be immediately consecutive. The obvious purpose of Congress should not be disregarded.

It is conceded by the Government that the petitioner, in seeking to be naturalized as a citizen of the United States, measures up to the requisites of 8 U. S. C. 1440a, as to (a) being a person of good moral character; (b) attached to the principles of the Constitution of the United States; (c) well disposed to the good order and happiness of the United States; (d) having been physically present in the United States for a single period of one year at the time of entering the armed forces of the United States, and finally that he served in the United States Army from May 4, 1953 to May 3, 1955, and was *honorably* discharged therefrom.

It is further conceded that the petitioner was lawfully admitted to the United States at Honolulu, T. H., in 1951. Further, that petitioner arrived at Newport News, Virginia, on July 12, 1952. At this juncture, the Government claims the petitioner, without permission, left his ship; the petitioner claims he had permission for shore leave, and that his vessel, departed before his return to where the ship was berthed.

The Government contends that the phraseology of the statute "having been lawfully admitted to the United

States and having been physically present within the United States for a single period of at least one year at the time of entering the armed forces," must be construed as meaning that the single period of physical presence must immediately follow a lawful entry.

The statute does not so provide. An examination and construction of the statute becomes necessary. The first essential query that asserts itself, relates to the purpose sought to be accomplished by Congress in enacting such statute. What was the intent of Congress? Did the legislators have in mind a reward, to those aliens who had honorably served in the armed forces of this Nation, with subtle technical reservations? Contrariwise, were they desirous of extending to all such aliens, lawfully admitted on any previous occasion, who rose to the defense of the United States at the time of the Korean conflict, an unqualified award for such military service, honorably accomplished, providing all other requisites were present?

Partial answer is found in House Report 223[1], under "Purpose of Bill". Such purpose was "the expeditious naturalization of aliens lawfully admitted into the United States as immigrants or non-immigrants * * *." Nowhere is there any indication of an intent that lawful entry must immediately precede physical presence within the United States for a single period of one year at the time of entering the armed forces. The fact that such a requirement is not contained in the asserted "Purpose of Bill", as set forth in the House Report, supports petitioner's contention that Congress did not intend that the lawful admission and physical presence sequence be immediately consecutive.

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[1] House Report, No. 223, 83rd Congress—1st Session, 1953; dated March 30, 1953.

Again in the House Report *(supra)* Congressman Graham reported as to whom were excluded; namely, subversives, conscientious objectors, those discharged under other than honorable conditions, or those discharged on their own application because of alienage. Petitioner is not included in any of the classes of exclusion, so designated. It may be true that such enumerated classes are not all inclusive. It is also true, that if it were the intention of Congress to exclude persons in the category of the petitioner, it would have been a simple undertaking to have included those persons in the "exclusionary provisions."

Added weight to petitioner's argument is found in the rejection, by both the House of Representative's Report *(supra)* and the Senate Report[2], of the recommendations made by William P. Rogers, Deputy Attorney General, to the effect that servicemen should be required to have lawful status at the time of entering the armed forces. Such recommendation concerned itself with compelling the servicemen, who sought naturalization pursuant to the statute, to bear the burden of proof, as then required by Section 318 of Immigation and Nationality Act (now Section 1429). The expressed reaction of the Committee, not only manifested its disdain for "technicalities involved in the continuance of lawful status", but added that such recommendation would "practically nullify the purpose of the legislation."

It must be assumed that Congress was aware of the burden of proof rule in Section 318. Under such section, any person had to show that he *entered* the country *lawfully*. By its action in rejecting the aforesaid recommenda-

[2] The Senate, 83d. Congress, First Session, Calendar #380; Report #378.

tions, Congress exhibited an intention that it was not concerned with imposing any burden of proving lawful entry, upon those whom it intended to reward for faithful and honorable service in the armed forces of the United States during the Korean conflict. In fact, too clearly emphasize its intention, Congress specifically enacted in this statute, "Notwithstanding the provisions of sections * * * and 1429 of this title * * *." Such phraseology is a clear indication that Congress, not only eliminated that part of Section 318 referring to the burden of proof as to a lawful entry into the country, but also all other provisions of such section.

The majority of the Court of Appeals, 2nd Circuit, said in Boubaris (*supra*, at 100):

> "Where Congress has meant an unlawful admission to be no bar to naturalization, it has specifically so provided. See e. g. U. S. C. A. Sec. 1001 (1946 edition) 58 Stat. 886, 887 (1944); where the language is: '* * * being unable to establish lawful admission into the United States,' and also 8 U. S. C. A. Sec. 1440 (1952), which contains similar language."

Although it may be conceded that the prototype of this Act, containing special legislation for non-citizens who served in World War I or World War II, were somewhat more liberal, such factor does not warrant nor justify the majority decision in Boubaris (*supra*) nor the adoption of such contention by the Government in this case. Our present question concerns the intention of Congress, at the time of the enactment of this Act. What may have been done at previous sessions of Congress, may lend aid in interpretation, but the same is never decisive nor controlling. More important, is the purpose, which Congress was endeavoring to accomplish, as well as the actual content of the statute. This was a rewarding statute, designed

to recognize this Nation's gratitude for service rendered to it, by aliens in an honorable manner.

Further, the lack of specific provisions in the Act, clearly spelling out the Government's claimed construction, supports petitioner's reasoning that Congress did not intend such an interpretation. If Congress had intended the construction, as urged by the Government, it could have used language comparable to that which it had used in 8 U. S. C. 392b, 47 Stat. 165; 54 Stat. 1174. That Act provided:

> "Sec. 392b. Alien veterans residing in United States, etc.
>
> (a) An alien veteran, as defined in Section 241 of this title, shall, if residing in the United States, be entitled at any time prior to May 25, 1940, to naturalization upon the same terms, conditions and exemptions which would have been accorded to such alien if he had petitioned before the armistice of the World War except that (1) such alien shall be required to prove that *immediately* preceding the date of his petition he has resided continuously within the United States for at least two years, in pursuance of a *legal admission* for permanent residence * * *."

In such statute the intent of Congress as to time and calibre of entry was specified by the particular words "immediately" and "legal admission." If Congress intended, in our present Act, that physical presence for a single year must immediately follow a lawful entry, it would have used similar language to that used in section 392b (*supra*); namely, that "such residence must immediately follow lawful admission."

Judge Hincks in Boubaris (*supra*) in writing for affirmance of the lower Court's order granting naturalization, aptly stated at page 100:

> "The structure of 1440 a is so simple that Congress must have realized that the language used failed to

provide continuity between the lawful admission and 'single period of at least one year'."

The petitioner, having been admitted to the United States as a non-immigrant; having resided in the United States for a single period of a year before induction into the Armed Forces; having served in said Armed Forces for two years and being honorably discharged therefrom; and being a person of good moral character, is entitled to become a naturalized citizen of the United States pursuant to the provisions of 8 U. S. C. 1440a.

II

The statute should be liberally construed in favor of petitioner. Any ambiguity should be resolved in favor of lenity.

In *Bell v. United States*, 349 U. S. 81; 75 S. Ct. 620, the Court was confronted with the problem as to whether petitioner committed but a single offense in the transportation of two women on the same trip in the same vehicle, or whether he was subject to consecutive terms under each count of the indictment, under the Mann Act, 18 U. S. C. 2421. In resolving the ambiguity of the statute in favor of petitioner, it was said at page 622:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

This same principle was cited with approval in a deportation proceeding under the Immigration and Nationality Act, in *Bonetti v. Rogers*, 78 S. Ct, 976 at 981.

The application of such principle acquires additional significance when we consider that at the time petitioner was drafted, the Selective Service personnel knew of the fact that petitioner was an alien. Further, the Immigration and Naturalization Service knew that petitioner had been induced into the armed forces and the only action which such Service employed, at such time, was to cancel the delivery bond (R. 8). The Selective Service then allowed petitioner to continue serving in the armed forces of the United States from January 15, 1954, until the date of his honorable discharge on May 3, 1955.

While it is true that the members of the Immigration and Naturalization Service cannot waive the provisions of the statute. However, the failure of the Immigration and Naturalization Service to take prompt action to secure his release from military service and carry out the deportation order, should weigh heavily against their present assertion that the petitioner should be denied the relief he seeks under this statute.

In *Fong Haw Tan v. Phelan*, 333 U. S. 6, 68 S. Ct. 374, Justice Douglas, in resolving an interpretation of 8 U. S. C. 155(a) in favor of the alien, said at page 376:

> "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U. S. 388, 68 S. Ct. 10. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statute less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

In such case, the forfeiture involved was the residence of an alien in this country. The Court's construction of

the statute, concededly, was generous towards the alien inasmuch as he was a convicted murderer. In our present case, the forfeiture attempted by the Government is not only the deprivation of petitioner's status as a naturalized citizen, resulting in subsequent deportation, but calls for such a drastic construction against petitioner who in good faith gave honorable and devoted service to the United States in the Korean crisis.

CONCLUSION

For the reasons stated it is respectfully submitted that the order of the Circuit Court of Appeals should be reversed and that of the District Court reinstated.

Respectfully submitted,

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